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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 26, 2008

In the Matter of

David Glicksman

Docket No. 2008-099
DEP File No. W07-1855
New Bedford

RECOMMENDED FINAL DECISION

This appeal challenges the Department of Environmental Protection's issuance of a c.91 Waterways license approving the construction of a permanent pier and seasonal ramp and float serving the applicant's single family home. The pier extends from the petitioner's property out and across the tidelands of a portion of Clark's Cove in New Bedford, Massachusetts. The petitioner filed a Notice of Claim (NOC) alleging that he was an aggrieved person because he shares a common boundary along the water's edge with the project and also owns land within 50 feet of the shoreline over which the project is located. The NOC alleges that the pier and the applicant's motorboat that would be docked at the float would:

- (a) pose a hazard to swimmers and waders using the beach;

- (b) negatively impact a significant shellfish habitat area identified by the Division of Marine Fisheries (“DMF”);
- (c) “impact the quality of life of all abutters”;
- (d) disturb waterfowl; and
- (e) damage the flora and fauna of the sea bed as a result of the impact of the boat’s propeller.

For the reasons set forth below, I recommend that MassDEP’s Commissioner dismiss the appeal on the grounds of the petitioner’s lack of standing and his failure to state a claim upon which relief can be granted.

The applicant filed a Motion to Dismiss on June 30, 2008 alleging deficiencies in the NOC including, the absence of a clear statement of facts upon which the petitioner’s claims were based, and a failure to set forth facts to demonstrate his status as an aggrieved party. The applicant also asserted that the petitioner’s claim to be an abutter is false because the abutter purportedly resides across the street and 85 feet distant from the applicant’s property. On July 8, 2008, the Department filed a supporting Motion to Dismiss and a Motion to Dismiss for Failure to State a Claim. The Department’s motion asserted that the NOC did not allege claims within the scope of the interests of the c. 91 regulations, lacked clear and concise supporting facts, and failed to establish the petitioner’s standing since the harms he alleged would arise from the activities approved in the license were indistinguishable from the effects the license would have on the general public. On July 14, 2008, I issued an Order that deferred ruling on the motions until I conducted a pre-screening conference, and directed the parties to file a pre-conference statement that identified the disputed facts and legal issues for resolution¹.

¹ See 310 CMR 1.01(5)(a)15 authorizing the Presiding Officer in an appeal to conduct a pre-screening conference with the parties to discuss potential settlement of the appeal and the issues for resolution in the appeal if it cannot be settled by agreement of the parties; and 310 CMR 1.01(9)(b) authorizing the Presiding Officer to order the parties to

The petitioner filed an Opposition to the motions to dismiss which re-alleged, without supporting facts, that the pier will cause severe harm to shellfish and other aquatic life and that due to his close proximity to the applicant's property he will suffer "inconveniencies and vexations" including an infringement on his access to the beach greater than other members of the public. The petitioner's pre-hearing statement identified the facts in dispute to be the adverse impacts of the pier on shellfish and the beach ecosystem, whether the location of the pier will lead to violations of state law regarding use of motor boats close to shore, and that his proximity to the property established his aggrieved party status.

At the pre-screening conference, the information presented by the parties elicited the following facts:

1. The petitioner, as well other residents in the neighborhood, has a right of access across an undeveloped parcel of land abutting the tideland area and beach on a portion of Clark's Cove in the vicinity of the proposed pier.
2. The applicant has moored a motorboat for several years in close proximity to the location of the proposed pier. The petitioner also has a sailboat moored in the vicinity of the beach.
3. There is a valid wetlands' Final Order of Conditions ("FOC") applicable to the project that contains numerous conditions designed to avoid, minimize and mitigate impacts from construction of the pier and operation of a motorboat. These include, for example, a requirement that prior to construction, the New Bedford Shellfish Constable stake out the construction impact area and that the applicant transplant shellfish from the impact area to a suitable area approved by the DMF or alternatively install seed shellfish in the

file a pre-hearing memorandum that includes a summary of the evidence that will be offered by the parties and contested issues of fact and law.

impact area (Condition 23). Construction vehicles and material can only be stored in upland areas (Condition 27). Dredging, including but not limited to the effects of prop wash, is neither proposed nor permitted under the FOC. (Condition 25).

The petitioner's presentation at the conference consisted of a reiteration of his concerns regarding the potential impact of the project on shellfish, the docking of the applicant's motorboat in proximity to the beach, the noise that would result from operating the motorboat, and, for the first time, the potential adverse effect from the pier on his property values.

Standing

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672, 322 N.E.2d 742, 748 (1975). Rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A. V, 34 Mass. App. Ct. 369, 373 n.8, 611 N.E.2d 729, 731 n.8 (1993). The Waterways Regulations define an aggrieved person as "any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A." 310 CMR 9.02.

The case law has established a three-prong test to determine if a person is aggrieved. First, one must allege a harm that is grounded in one of the public interests protected by c. 91. Second, the harm alleged must be a concrete injury to oneself that would flow from the subject matter of the proceeding. Third, one must show that the alleged injury is unique or different from an injury that would be suffered by a member of the general public. Matter of Waterside Group LLC-2, Docket No. 2001-130, Recommended Final Decision, 2 DEPR 291, 292-93 (Dec. 3, 2002). A petitioner must present facts sufficient to support a determination that he is in fact

aggrieved by the project. “That burden is not a particularly difficult one to meet,”...[but] “as low a threshold as this is, however, it cannot be crossed with anything other than factual support.” Matter of Town of Chatham, Docket No. 98-078 Final Decision (December 22, 1999). “These requirements are not an invitation to conjure up speculative, hypothetical or conjectural injuries and transform them, with an added dash of concerns, interests and expressed preferences and sensibilities, into intervention grounds. Plainly put, the proposed intervenor must assert a real injury to a personal interest that the law governing the appeal can protect. Nothing short of that will do. It is not enough, thus, for a proposed intervenor to assert a generalized or undifferentiated public interest in the subject matter of the adjudicatory appeal.” Matter of Great Harbor Yacht Club, Docket No.05-1269, Decision and Order on Motion to Intervene, (April 10, 2006).

In the present case, the petitioner has not set forth any facts that either relate to an interest protected by c. 91 or distinguish his claims of injuries from those which might be suffered by the general public if the allegations were proved true. Despite the petitioner’s assertion, it is not apparent how the presence of the pier would infringe on his access to the beach or tidelands since there is no claim that the pier is in any way a physical barrier to his access route to the shoreline, and the pier extends directly from the rear of the applicant’s property. Moreover, the license is conditioned on the public’s right “to pass on foot for any purpose from dawn to dusk within the area of the subject property lying seaward of the mean high water mark” and to pass under the pier as well. (See, License Conditions 1 and 2). No facts were provided to support the petitioner’s assertion that the proximity of the pier to the beach would physically interfere with the public’s right of access to tidelands. The petitioner’s unsupported allegation of interference, if assumed to be true, would not make the interference he might be caused any different from the

pier's impact on other residents who frequent the beach. Furthermore, the petitioner makes no claim that the pier would interfere with the navigation of his sailboat.

In regard to the docking of the motorboat, the petitioner asserts that the license would result or lead to a violation of the DMF regulations at 323 CMR 2.07(2), which provide that motorboats shall not be operated within 150 feet of a shoreline used as a swimming area. In the first instance, the facts submitted do not support that claim. As documented in the approved plan, the structure includes a 150 foot pier and a seasonal walkway extending out from the end of the pier to a float to which the boat will be moored. The combined length of these three structural elements results in the boat being docked approximately 173 feet from the shoreline. Thus the license is not, on its face, inconsistent with the 150 foot operating prohibition. The allegation of noise from the operation of a 35 foot motorboat² in the vicinity of the beach cannot be considered a basis upon which to challenge the licensing of a pier that provides for a boat to be docked over 170 feet from the shore, since it is a fundamental c. 91 interest to allow for public navigation of waterways³. Beyond the lack of a valid c. 91 interest, standing to assert the claim is also absent, since being subject to motorboat noise on a beach open to a large number of residents does not establish a unique adverse impact the petitioner may suffer.

The petitioner's final set of claims relating to impacts to shellfish and the general aquatic environment are similarly deficient. The petitioner failed to set forth any facts that suggested that the alleged impacts to the shellfish beds would cause him unique harm. It is clear from the NOC and his subsequent filings that he asserts a general interest in ecosystem protection rather than, for example, an impact on his livelihood because he supports himself through shellfishing. Also,

² See, FOC, Condition 41 prescribing the maximum size of the boat.

³ The Waterways Regulations do not identify the DMF regulations provision as an applicable environmental regulatory program to which a project must comply. See, 310 CMR 9.33(1).

as noted above, the FOC, which is incorporated into the terms and conditions of the license⁴, is replete with conditions that require the construction and operation of the project avoid and minimize adverse impact to the shellfish beds and compel, under the direction of DMF, the mitigation and/or restoration of the affected shellfish population. This is fully consistent with the allocation of statutory and regulatory responsibilities for the protection of shellfish habitat which is under the primary jurisdiction of the Wetlands Protection Act and its governing regulations at 310 CMR 10.34.

Failure to State a Claim Upon Which Relief Can be Granted.

A motion to dismiss for failure to state a claim tests the legal sufficiency of a petitioner's claim, that is, whether it seeks relief that can be granted. Matter of Town of Falmouth Department of Public Works, Docket No. 93-032, Decision and Order on Motion to Dismiss (September 2, 1994). Claims may be dismissed as legally insufficient if it appears beyond a doubt that the petitioner is entitled to no relief available in a c. 91 license appeal. In order to establish a basis for relief, the petitioner's appeal must raise claims that are related to the public trust interests protected by the Act. Treasure Island Marina, Docket No. 85-11, Final Decision (March 19, 1987).

Much of the rationale set out above in regard to the petitioner's lack of standing applies with equal force to his failure to state cognizable claims under c. 91. The allegations contained in NOC and the petitioner's pre-screening memorandum, as amplified at the pre-screening conference, did not present claims upon which relief could be granted as a result of the license's conflict with the public interests protected under c. 91.

⁴ See, 310 CMR 9.33(3) which provides that if a Final Order of Conditions has been issued, the project shall be presumed to comply with the Wetland Act, and the Final Order shall be deemed to be incorporated in to the license.

The location of the pier in relation to the route of access to the tidelands combined with the conditions under which the license was granted preclude a determination that the petitioner's or other members of the public's access to or foot passage across the tidelands has been significantly interfered with (310 CMR 9.35(3)). As noted earlier, the petitioner has not asserted that any of the structures approved under the license will interfere with his right of navigation (310 CMR 9.35(2)(a)). The claim regarding the inconsistency between the proposed location of the applicant's motorboat and the DMF's regulations prescribing a setback for motorboat operations near swimming areas has been demonstrated to be based on an inaccurate representation of the distance between the boat's docking location, as documented in the approved license plans, and the shoreline. In any event, there was nothing presented upon which to conclude that the boat's presence would interfere with the public's right to float on, swim in or otherwise move freely within the water column without touching the bottom 310 CMR 9.35(2)(b)⁵. Furthermore, there is no basis within the c. 91 regulations to conclude that DMF's regulations regarding the operation of a motorboat is a c. 91 public interest that a license for a water-dependent pier and float must address⁶.

To the extent that the protection of the public right to shellfishing is a c.91 interest (310 CMR 9.35(3)(a)), the project's potential impacts to the shellfish bed have been extensively addressed in the FOC, and the petitioner has neither asserted in the NOC nor otherwise provided evidence from which it could be inferred that those interests have not been fully addressed by the terms of the FOC (See, e.g., Condition 23 and 25). Finally, the petitioner's assertion that the presence of the pier might adversely affect the value of his property was a last minute conjecture

⁵ The DMF regulations provide that a motorboat operating near a swimmer must proceed at "headway" speed. 323 CMR 2.07(3).

⁶ See, 310 CMR 9.33 which sets out the applicable environmental regulatory programs to which a project must comply.

made at the pre-screening conference and, even if somehow proved accurate, the preservation of upland property values located in proximity to public tidelands is not an interest protected under c. 91 and, therefore, not a ground to deny a license for a water-dependent use.

For the reasons set out above, I recommend that the Motions to Dismiss be granted and the petitioner's appeal be dismissed.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Philip Weinberg
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.